

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

January 5, 2017, at 2:00 p.m.

1. 16-90002-E-11 RLC-9	1263 INVESTORS LLC Stephen Reynolds	APPROVAL OF DISCLOSURE STATEMENT FILED BY DEBTOR 1263 INVESTORS, LLC 10-9-16 [72]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the 20 largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on November 18, 2016. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion to Approve Disclosure Statement has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Approve Disclosure Statement is granted/denied.

Seeking approval of a disclosure statement in this bankruptcy case has been an elusive process for the Debtor in Possession ("ΔIP"). Twice the ΔIP obtained orders shortening time to expedite such approval. Both times the ΔIP failed to serve notice of the hearing, with the requests for approval denied without prejudice.

On December 6, 2016, Notice of the January 5, 2017 hearing on the Request for Approval of Disclosure Statement was filed by ΔIP. It states that opposition must be filed and served by December 16,

2016, which is ten days later. The Notice does not reference which disclosure statement is the subject of the hearing or where it is located on the court's Docket. Two have been filed with the court.

Federal Rule of Bankruptcy Procedure 2002(b) requires that parties in interest be given twenty-eight (28) days notice for filing objections to the approval of a disclosure statement.

At the hearing, counsel for ΔIP explained that the notice given for the January 5, 2017 hearing was **XXXXXXXXXXXXXXXXXXXXX**.

REVIEW OF THE DISCLOSURE STATEMENT

The court has reviewed the instant Disclosure Statement (Dckt. 72) and the one filed on September 8, 2016 (Dckt. 63). The court notes that there are only two substantive differences:

- A. Under the section SUMMARY OF THE PLAN OF REORGANIZATION subsection D. Means of Implementing the Plan, the instant Disclosure Statement includes a statement that the "sales contemplated by this Plan of Reorganization shall be completed within sixty (60) months of the Plan Effective Date. It is the intention of the Debtor to complete these sales in much less time."
- B. The instant Disclosure Statement does not include an "Exhibit A" copy of the Plan of Reorganization.

Case filed: January 5, 2016

Background: The Debtor in Possession was formed in December 2009 to pursue real estate investment and lending opportunities. Debtor in Possession became the owner of two properties in Oakdale, California: one acquired in October 2010 and the other in March 2015. Before filing this bankruptcy case, Debtor in Possession attempted and failed to sell the property that had been acquired in October 2010. Nationstar sought to foreclose on the property, and Debtor in Possession filed this bankruptcy case.

Summary of Plan:

Creditor/Class	Treatment	
Unclassified Claim	Claim Amount	\$11,000.00
	Impairment	Unimpaired
Administrative Expenses		

	<p>Expenses arising in the ordinary course of business—estimated current at confirmation paid in full on the Effective Date or according to terms of obligation if later</p> <p>Professional Fees, as approved by the Court—estimated to be \$10,000.00 or less paid in full on Effective Date or according to separate written agreement or according to court order if such have not been approved by the court on the Effective Date</p> <p>U.S. Trustee fees: estimated \$1,000.00 or less paid in full on Effective Date</p>	
Unclassified Claim Priority Tax Claims	Claim Amount	\$0.00
	Impairment	Unimpaired
	<u>Internal Revenue Service</u> : Nothing due	
Class 1: The Bank of New York Mellon f/k/a The Bank of New York as successor in interest to JP Morgan Chase Bank, N.A. as Trustee for Structured Asset Mortgage Investment II Inc. Mortgage Pass-Through Certificates Series 2004-AR7. This claim is serviced by Nationstar Mortgage LLC	Secured Claim Amount	\$601,299.13
	Impairment	Impaired
	<p>Claim No. 2 was filed on May 11, 2016, in the amount of \$601,299.13 and is secured by a first priority deed of trust against real property commonly known as 7318 Crane Road, Oakdale, California.</p> <p>The property's value was determined to be \$486,500.00. Dckt. 56.</p> <p>Debtor in Possession plans to sell the property and use the proceeds to pay less than the amount of the Class 1 claim, which will require permission from the claim holder.</p> <p>Debtor in Possession anticipates that Class 1 will waive any unsecured portion of its claim and will receive more than it would if it were to exercise its foreclosure rights under the senior deed of trust.</p>	

Class 2: The Bank of New York Mellon f/k/a The Bank of New York as successor trustee to JP Morgan Chase Bank, N.A. as Trustee for the certificateholders of SWABS Master Trust, revolving home equity loan asset backed notes, series 2004-Q by assignment recorded July 26, 2012	Secured Claim Amount	\$0.00, 11 U.S.C. § 506(a) Valuation
	Impairment	Impaired
	The property's value was determined to be \$486,500.00. Dckt. 56.	
	Class 1, as senior lien, exceeds the property's value.	
Class 3: Bellavista Capital a/k/a Bella Vista Capital	There will be no distribution to Class 2, unless Class 2 files a proof of claim and shows an allowed claim.	
	Claim Amount	\$250,000.00
	Impairment	Impaired
	The original claim amount is \$250,000.00 and is secured by a first priority deed of trust against property commonly known as 7348 Crane Road, Oakdale, California.	
Class 4: General Unsecured Claim	Debtor in Possession anticipates selling the property to satisfy the Class 3 claim.	
	Debtor in Possession believes that the value of the property is greater than the Class 3 claim.	
	Claim Amount	\$96,163.00
	Impairment	Impaired
Class 5: Equity Security Holders	General unsecured claim holders will receive pro rata payment from the net proceeds of the sale of the 7348 Crane Road property.	
	The sale is not expected to generate net proceeds to pay Class 4.	
	Claim Amount	
	Impairment	Unimpaired
	The equity security holders shall receive a distribution only in the event that Classes 3 & 4 are paid in full.	

A. C. WILLIAMS FACTORS PRESENT

Y Incidents that led to filing Chapter 11

Y Description of available assets and their value

 Anticipated future of the Debtor

Y Source of information for D/S

Y Disclaimer

Y Present condition of Debtor in Chapter 11

Y Listing of the scheduled claims

Y Liquidation analysis

N Identity of the accountant and process used

 Future management of the Debtor

Y The Plan is attached

In re A.C. Williams, 25 B.R. 173 (Bankr. N.D. Ohio 1982); *see also In re Metrocraft*, 39 B.R. 567 (Bankr. N.D. Ga. 1984).

APPLICABLE LAW

Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains “adequate information” to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).

“Adequate information” means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g., In re A.C. Williams, supra.*

There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bankr. N.D. Ga. 1984). “Adequate information” is a flexible

concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. *In re Michelson*, 141 B.R. 715, 718–19 (Bankr. E.D. Cal. 1992).

The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D. Pa. 1982).

The court begins its analysis with the statutory requirements of 11 U.S.C. § 1125 for a disclosure statement. Solicitation of an acceptance or rejection of a plan may be made with a written disclosure statement which was approved by the court. The disclosure statement must provide “adequate information.” The term “adequate information” is defined in 11 U.S.C. § 1125(a)(1) to be,

(1) “adequate information” means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information;...

Determination of whether there is “adequate information” is a subjective determination made by the bankruptcy court on a case by case basis. *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988), *cert. denied* 488 U.S. 926 (1988). Non-bankruptcy rules and regulations concerning disclosures do not govern the determination of whether a disclosure statement provides adequate information. 11 U.S.C. § 1125(d); *Yell Forestry Products, Inc. v. First State Bank*, 853 F.2d 582 (8th Cir. 1988).

DISCUSSION

The proposed Disclosure Statement lists the specific creditors, classes of claims, and proposed treatment. After considering the court’s comments on the prior Disclosure Statement, Debtor in Possession has removed the superfluous Exhibit A copy of the Plan of Reorganization and has stated that all sales are expected to be conducted within sixty days of the effective date of the Plan.

Based on the forgoing, the court ~~denies~~/grants the motion to approve the Disclosure Statement.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Approval of Disclosure Statement filed by the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is ~~denied~~/granted.

2. <u>13-91315-E-7</u> <u>15-9021</u> MCGRANAHAN V. BAY CITY MECHANICAL, INCORPORATED	APPLEGATE JOHNSTON, INC.	PRE-TRIAL CONFERENCE RE: COMPLAINT FOR (1) AVOIDANCE OF PREFERENTIAL TRANSFERS; AND (2) RECOVERY OF AVOIDED TRANSFERS 6-30-15 [<u>1</u>]
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Plaintiff's Atty: Daniel L. Egan
Defendant's Atty: William C. Last, Jr.

Adv. Filed: 6/30/15
Answer: 7/29/15

Nature of Action:
Recovery of money/property - preference

Notes:
Pretrial set for 9/29/16 by the court. Parties requested continuance to 1/5/17 [Dckt 47]

Chapter 7 Trustee, Michael D. McGranahan's Pretrial Conference Statement filed 12/20/16 [Dckt 56]

Pre-Trial Statement of Defendant Bay City Mechanical filed 12/22/16 [Dckt 58]

SUMMARY OF COMPLAINT

The Plaintiff-Trustee alleges that Defendant Bay City Mechanical, Incorporated received payments totaling \$254,819 within ninety days of the commencement of the Debtor's bankruptcy case. It is asserted that this transfer may be avoided pursuant to 11 U.S.C. § 547 and recovered by the estate as provided in 11 U.S.C. § 550.

SUMMARY OF ANSWER

Defendant admits and denies the specific allegations of the Complaint. Defendant also pleads thirteen affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), and (O). Complaint 3, 4, Dckt. 1. In its answer, Defendant Bay City Mechanical, Inc. admits the allegations of jurisdiction and core proceedings. Answer 3, 4, Dckt. 9. To the extent that any issues in this Adversary Proceeding are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

SUMMARY ADJUDICATION OF ISSUES AND CLAIMS

The court has determined that the elements for a preferential transfer pursuant to 11 U.S.C. § 547(b) have been established in this Adversary Proceeding. Order, Dckt. 43. The court’s findings of fact and conclusions of law in determining that the elements for a preferential transfer have been established are set for in the Civil Minutes (Dckt. 41) for the July 7, 2016 hearing on the Plaintiff-Trustee’s Motion for Summary Judgment.

The court’s findings and conclusions include the following:

- A. In this case, Defendant has admitted that it is an unsecured creditor and that Debtor made payments to Defendant on account of an antecedent debt owed by Debtor to Defendant before the transfer was made. Additionally, the transfers were made on April 18, 2013, and April 19, 2013. Any transfers made on or after April 17, 2013, fall within the 90 day preference period.
- B. Defendant does not dispute that each of the Challenged Payments constituted a transfer of an interest of the debtor in property within the meaning of Section 547(b). Dckt.37. There is no genuine issue for trial on this element of the claim.
- C. Defendant admits in Plaintiff’s Requests for Admission Nos. 4 and 14 that the Contested Payments “constitute a transfer to or for the benefit of a creditor within the meaning of Bankruptcy Code section § 547(b)(1).” (internal quotations omitted) Dckt. No. 26, Ex. 4, p. 12, 14.
- D. Here, whether the money was retained by Defendant or used by Defendant to pay its creditors (the suppliers), the transfer of the property of the estate was for the benefit of Defendant by reducing Defendant’s liability to a third-party. This is admitted in the Declaration of Bobbie Amos, Chief Financial Officer of Defendant, stating,

“10. Each of the checks the Trustee has referred to as Payments A and B are joint checks. The check referred to by the Trustee as Payment A is a two party check written to both Bay City and Bay City’s supplier Norman S. Wright Mechanical Equipment Co. The check referred to

as Payment B is a two party check written to both Bay City and Bay City's supplier Therma Corporation. Bay City did not cash these checks and did not receive these funds. Each check once received by Bay City was endorsed and passed on to the supplier named on the check. Bay City never had the use or possession of these funds."

Declaration, p. 2:20–26; Dckt. 35. The payments received from Debtor were used for the benefit of Defendant to pay obligations owed by Defendant to its suppliers. Defendant has not provided evidence to support the contention that there were personal obligations owing to the third-parties. While Defendant seeks to argue such for the purpose of defeating the summary judgment motion, there is not "some evidence" presented to make this a material fact in bona fide dispute.

- E. Defendant admits that each of the Challenged Payments was for or on account of an antecedent debt owed by the debtor before the transfer was made. Dckt.37 There is no genuine issue for trial on this element of the claim.
- F. Debtor was insolvent during the period the transfers were made to or for the benefit of Defendant. Defendant's contention that the Debtor's Schedules establish solvency is not support by the evidence. On the Schedules listed claims, stating some as "unknown."

Eleven of these "unknown" claims have had proofs of claims filed in the claims registry for Debtor's bankruptcy case in the aggregate amount of about \$14,013,009.39. While these claims were disputed, unliquidated, or contingent, such claims must still be included in determining total indebtedness for purposes of determining insolvency. *See In re Sierra Steel, Inc.*, 96 B.R. 275,279 (B.A.P. 9th Cir. 1989). A court may look to future events to determine how to treat a debt. *Diamond v. Osborne*, 102 F. App'x 544, 549 (9th Cir. 2004). Taking these new claims into account and using Defendant's balance sheet test, there are now assets valued at \$9,236,805.90 and liabilities of \$21,038,467.39, leaving liabilities in excess of assets by \$11,801,661.49.

Further, there is a presumption of insolvency with respect to any transfers within ninety days of the commencement of the filing of the bankruptcy case. It is the creditor's burden of presenting evidence to overcome this presumption. Here, all Defendant offers are the Debtor's schedules filed in this case listing assets and liabilities. Defendant offers no legal arguments why the Debtor may provide the court with credible testimony as to the value of assets in the ninety days leading up to the filing of the bankruptcy case. Debtor is not a party to this Adversary Proceeding. While stating that the "balance sheet test applies," no evidence of the assets and liabilities of the Debtor during any period of the ninety day period prior to the commencement of the bankruptcy case was filed has been provided. At best, is an unsupported statement by a representative of the Debtor of a dollar amount of assets and a dollar amount for liabilities.

Further, as noted by the Trustee, Debtor's "knowledge" of its finances are limited and incomplete, having to list fifty-eight creditors as having "unknown claims." These include not "knowing" what is owed to American Honda Finance Corporation, County Bank, Ford Motor Credit, and GMAC for vehicle loans. Looking at Schedule E (Dckt. 37) Debtor states that the obligation owing to the Internal Revenue Service is \$0.00. However, in Amended Proof of Claim No. 2 the Internal Revenue Service asserts a \$95,560.34 priority claim. On Schedule F Debtor lists AFCO as having a claim for \$18,512.00. However, AFCO Acceptance Corporation has filed Proof of Claim No. 79 asserting a secured claim in the amount of \$129,585.54. Another "unknown" unsecured claim is stated for Bogard Construction, Inc. on Schedule E. However, Bogard Construction, Inc. has filed Proof of Claim No. 67 asserting a \$395,458.00 general unsecured claim.

Defendant offered no evidence putting the issue of insolvency in genuine dispute. While the court takes "judicial notice" that Schedules were filed, that is not notice that the contentions of the information stated therein are without dispute. The court cannot say that it is commonly known that Debtor was not insolvent. It cannot be said that it is commonly known that Debtor's assets exceeded its liabilities. The court cannot say that it is commonly known that all of the debts listed as unknown are \$0.00. Defendant has not show a basis for the court to take "judicial notice" of the "fact" that Debtor was solvent as of the commencement of the bankruptcy case.

G. Plaintiff has provided Debtor's bank statement as evidence that Payment A cleared Debtor's bank on April 18, 2013, and Payment B cleared the Debtor's bank on April 19, 2013. These two dates are within 90 days before the date of the filing of this petition pursuant to 11. U.S.C. §547(b)(4).

H. Based on the evidence presented by Defendant, it had not exercised its stop payment rights, if any, was not paid by virtue of its stop payment rights if any, and was paid like any other creditor holding an unsecured claim of the Debtor in the ninety days prior to the commencement of this case. With respect to the contention of stop payment rights, it is argued that "if Bay City had perfected its Stop Notice, it would have been entitled to full payment under the Stop Notice or alternatively through the payment bond." Memorandum in Opposition, p. 5:7-8; Dckt. 33.

Bobbie Amos (Defendant's witness with respect to asserted stop payment rights) does not testify as to what facts existed upon which the stop notice rights would arise in connection with the claims in this Adversary Proceeding, what action was taken to enforce such stop notice rights, and that such rights were properly enforced. Bobbie Amos goes further to state that while asserting Defendant has some stop notice rights, Defendant was issuing "lien releases." The court is directed to Exhibit A, Dckt. 34, as being a copy of the "lien release." This Exhibit is a combined release of whatever lien, stop payment, or payment bond rights which may exist. However, it does not provide evidence of there being any such stop payment, lien rights, or payment bond rights.

Further, the Release is stated to be for the period through January 31, 2013. It states that Defendant has received \$430,817.40 in release payments. The date written by the signature block is April 15, 2013. The two checks at issue are dated April 9, 2013 (Exhibits A and B, Dckt. 26) and are asserted to have cleared the Debtor's bank on April 18 and 19, 2013.

The court does not have evidence before it showing that Defendant was entitled to jump the cue and take monies ahead of other creditors having general unsecured claims.

Defendant admits in its Response that at all times herein, Defendant was an unsecured creditor of Debtor and does not dispute the fact that each Challenged Payment was made on account of what would have been an unsecured claim had the payment not been made. Dckt. 2, 37.

- I. There is no genuine dispute as to these facts and Plaintiff has established the elements of his cause of action under 11 U.S.C. § 547(b). The Motion for Summary Judgment as to the First Cause of Action is granted.

The court shall issue an Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

- A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.
- B. **Plaintiff** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2017**.
- C. **Defendant** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2017**.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, **2017**.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, **2017**.
- F. The Trial shall be conducted at ----**x.m. on -----, 2017**.

The Parties in their respective Pretrial Conference Statements, Dckts. 56, 58, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

Plaintiff–Trustee

Defendant(s)

Jurisdiction and Venue:

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C.

<p>1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A), (E), and (O). Complaint 3, 4, Dckt. 1. In its answer, Defendant Bay City Mechanical, Inc. admits the allegations of jurisdiction and core proceedings. Answer 3, 4, Dckt. 9. To the extent that any issues in this Adversary Proceeding are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.</p>	
<p>Undisputed Facts:</p> <p>1. Court’s determination that claims for a preferential transfer pursuant to 11 U.S.C. § 547(b) have been determined pursuant to a Motion for Summary Judgment. Civil Minutes, Dckt. 41, and Order, Dckt. 43.</p>	<p>Undisputed Facts:</p> <p>1. Concurs with Plaintiff-Trustee’s statement as to the court’s prior ruling.</p>
<p>Disputed Facts:</p> <p>1. That grounds exist for Defendant’s asserts affirmative defenses under Section 547(c)(1), (2) and (4).</p>	<p>Disputed Facts:</p> <p>1. Defendant alleges, and Plaintiff disputes, that the payments to Defendant that Plaintiff seeks to avoid were made in the ordinary course of business and according to ordinary business terms.</p> <p>2. Defendant alleges, and Plaintiff disputes, that the payments were simultaneous exchanges for new value.</p> <p>3. Defendant alleges, and Plaintiff disputes, that the payments to Defendant that Plaintiff seeks to avoid were offset by new value received from Defendant.</p>
<p>Disputed Evidentiary Issues:</p> <p>1. None identified.</p>	<p>Disputed Evidentiary Issues:</p> <p>1. None identified</p>
<p>Relief Sought:</p> <p>1. Avoidance and Recovery of the \$211,373.73 and \$43,444.57 transfers pursuant to 11 U.S.C. §§ 547(b) and 550.</p>	<p>Relief Sought:</p> <p>1. Defendant requests the Court to deny Plaintiff requests for avoidance and recovery of the challenged payments.</p>

<p>Points of Law:</p> <ol style="list-style-type: none"> 1. The Plaintiff-Trustee having established a prima facie case, Defendant has the burden of proof going forward to establish the asserted affirmative defenses. 	<p>Points of Law:</p> <ol style="list-style-type: none"> 1. Laches - Plaintiff's long delay in bringing this action was made in bad faith. 2. 11 U.S.C. Section 547(c)(2) applies as payments were made in the ordinary course of business according to ordinary business terms. 3. 11 U.S.C. Section 547(c)(I)(a) applies as the payment was a contemporaneous exchange for new value. 4. 11 U.S.C. Section 547(c)(4) applies as Defendant provided new value for the benefit of debtor.
<p>Abandoned Issues:</p> <ol style="list-style-type: none"> 1. None identified. 	<p>Abandoned Issues:</p> <ol style="list-style-type: none"> 1. None identified
<p>Witnesses:</p> <ol style="list-style-type: none"> 1. Michael D. McGranahan (Plaintiff-Trustee) 2. Bobby Amos (adverse witness) 	<p>Witnesses:</p> <ol style="list-style-type: none"> 1. Michael D. McGranahan (adverse.) 2. Bobby Amos 3. Marcos Davis
<p>Exhibits:</p> <ol style="list-style-type: none"> 1. Check dated April 9 2013 in the amount of \$211,375.73 (BCM 00121) 2. Check dated April 9 2013 in the amount of \$43,444.57 (BCM 00122) 3. Bank statements produced by Central Valley Community Bank 4. Civil Minute Order dated July 12 2016 	<p>Exhibits:</p> <ol style="list-style-type: none"> 1. Contracts related to the Project. 2. Change orders. 3. Invoices for Defendants work on the project. 4. Payments received by Defendant. 5. Defendant's Certified Pay-roll information for the Project.

<p>(Docket No. 43.)</p>	<p>6. Invoices from Defendant's Subcontractors and Suppliers for their work on the Project.</p> <p>7. Payments sent to Defendant's Subcontractors and Suppliers for their work on the Project either by Defendant or by joint check from the debtor.</p> <p>8. Defendant's Waivers and Releases on Partial Payment.</p> <p>9. Payment Information for the City of San Jose Payments to Debtor for the Project.</p> <p>10. Documents produced by Liberty Mutual.</p> <p>11. Deposition testimony by representatives of Liberty Mutual.</p>
<p>Discovery Documents:</p> <p>1. Defendant's Response to Requests for Admissions, Set No. 1.</p> <p>2. Defendant's Response to Requests for Admissions, Set No.2.</p> <p>3. Defendant's Response to Requests for Admissions, Set No.3.</p> <p>4. Defendant's Response to Plaintiff's Interrogatories, Set No.1.</p> <p>5. Defendant's Response to Plaintiff's Interrogatories, Set No.2.</p>	<p>Discovery Documents:</p> <p>1. Deposition testimony of representative of Liberty Mutual.</p>
<p>Further Discovery or Motions:</p> <p>1. The parties have agreed to discovery being extended for one deposition (deponent not identified).</p>	<p>Further Discovery or Motions:</p> <p>1. The parties have agreed to discovery being extended for one deposition (deponent not identified).</p>

Stipulations: 1. None identified	Stipulations: 1. None identified
Amendments: 1. None identified	Amendments: 1. None identified
Dismissals: 1. None identified	Dismissals: 1. None identified
Agreed Statement of Facts: 1. None identified	Agreed Statement of Facts: 1. None identified
Attorneys' Fees Basis: 1. Attorneys' fees not requested	Attorneys' Fees Basis: 1. Attorneys' fees not requested
Additional Items 1. None identified	Additional Items 1. None identified
Trial Time Estimation: One-Half Day	Trial Time Estimation: One Day

3. [13-91315-E-7](#)
[15-9026](#)

APPLEGATE JOHNSTON, INC.

**MCGRANAHAN V. STEPHEN CIARI
PLUMBING AND HEATING, INC.**

**CONTINUED PRE-TRIAL CONFERENCE
RE: COMPLAINT FOR (1) AVOIDANCE
OF PREFERENTIAL TRANSFERS; (2)
RECOVERY OF AVOIDED TRANSFERS
AND (3) OBJECTION TO CLAIM
7-9-15 [\[1\]](#)**

Plaintiff's Atty: Daniel L. Egan
Defendant's Atty: Matthew P. James

Adv. Filed: 7/9/15
Answer: 8/21/15

Nature of Action:
Recovery of money/property - preference

Notes:
Pretrial set for 9/29/16 by the court. Parties requested continuance to 1/5/17 [Dckt 33]

Chapter 7 Trustee, Michael D. McGranahan's Pretrial Conference Statement filed 12/20/16 [Dckt 36]

SUMMARY OF COMPLAINT

The Plaintiff-Trustee alleges that Defendant Stephen Ciari Plumbing and Heating, Inc. received payments totaling \$32,392.74 within ninety days of the commencement of the Debtor's bankruptcy case. It is asserted that this transfer may be avoided pursuant to 11 U.S.C. 547 and recovered by the estate as provided in 11 U.S.C. 550. The Plaintiff-Trustee also states as the Third Cause of Action an objection to the claim of Stephen Ciari Plumbing and Heating, Inc. (Proof of Claim No. 86-1) in the Debtor's bankruptcy case.

SUMMARY OF ANSWER

In the Answer Defendant admits and denies specific allegations in the Complaint. The Answer also states twenty-one affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

The Plaintiff alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A), (E), and (O). Complaint 3, 4, Dckt. 1. At the Status Conference, Defendant Stephen Ciari Plumbing and Heating, Inc. stated on the record that it concurred with the allegations that the claims asserted under 11 U.S.C. 547 and 550 in the Complaint are core matters. Further, to the extent that any issues in the existing Complaint in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court

entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

The court shall issue an Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

- A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.
- B. **Plaintiff** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2017**.
- C. **Defendant** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2017**.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, **2017**.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, **2017**.
- F. The Trial shall be conducted at ----**x.m. on -----, 2017**.

The Parties in their respective Pretrial Conference Statements, Dckts. -----, 41, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

Plaintiff-Trustee	Defendant
<p>Jurisdiction and Venue:</p> <p>The Plaintiff alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A), (E), and (O). Complaint 3, 4, Dckt. 1. At the Status Conference, Defendant Stephen Ciari Plumbing and Heating, Inc. stated on the record that it concurred with the allegations that the claims asserted under 11 U.S.C. 547 and 550 in the Complaint are core matters. Further, to the extent that any issues in the existing Complaint in this Adversary Proceeding are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.</p>	
<p>Undisputed Facts:</p> <p>1. Debtor Applegate Johnston made a transfer to Defendant on or after May 29, 2013 in the amount of \$32,392.74 (the</p>	<p>Undisputed Facts:</p> <p>1. Not identified, but Defendant believes that a joint statement with Plaintiff-Trustee is possible.</p>

<p>“Challenged Payment.”) The transfer was made by check, a copy of which is attached as Exhibit 1.</p> <p>2. The Challenged Payment was a transfer of property of the Debtor.</p> <p>3. At the time of the transfer, Defendant was a creditor of Debtor.</p> <p>4. The Challenged Payment was made on account of an antecedent debt owed by Debtor to Defendant.</p> <p>5. Debtor commenced a Chapter 7 bankruptcy case on July 16, 2016. The Challenged Payment was made within 90 days of the bankruptcy filing.</p> <p>6. The Challenged Payment was made on account of a debt that was unsecured as to Debtor. Defendant had no security interest in property of the Debtor to secure the payment.</p> <p>7. The distribution to unsecured creditors in Debtor’s case will be less than 100% of the amount of the debt.</p> <p>8. Defendant did not provide any new value to Debtor after the Challenged Payment.</p>	
<p>Disputed Facts:</p> <p>1. Defendant may seek to challenge the presumption that Debtor was insolvent in the 90 days prior to the bankruptcy case.</p> <p>2. Defendant contends that the Challenged Payment was made in the ordinary course of business or financial affairs of the Debtor and the transferee, or that it was made according to ordinary business terms.</p>	<p>Disputed Facts:</p> <p>1. That the remaining construction fund held by the City of San Jose on the Environmental Innovation Center Project, including matured subcontractor and supplier claims, was sufficient to satisfy a hypothetical claim by Defendant in the amount of the transfer at issue in this action (\$32,392.74).</p> <p>2. That Defendant maintained a valid claim against the project payment bond and would have had enforceable rights against the project payment bond and/or the remaining construction fund if the Trustee</p>

	<p>had not unreasonably waited nearly two years to file the present preference action related to a single payment.</p> <p>3. Whether the Debtor's assets exceeded its liabilities as of the date of the transfer at issue.</p>
<p>Disputed Evidentiary Issues:</p> <p>1. None identified</p>	<p>Disputed Evidentiary Issues:</p> <p>1. None identified</p>
<p>Relief Sought:</p> <p>1. Trustee seeks avoidance (11 U.S.C. § 547(b) and recovery (11 U.S.C. § 550) of the Challenged Payment.</p>	<p>Relief Sought:</p> <p>1. Defendant seeks a dismissal of the Trustee's complaint, plus costs, and that Trustee recover nothing under his complaint.</p>
<p>Points of Law:</p> <p>1. 11 U.S.C. § 547(b)</p> <p>2. Bankruptcy Code provides a presumption that the Debtor is insolvent in the 90 days prior to the bankruptcy filing. (11 U.S.C. section 547(f))</p> <p>3. Section 547 (b) (5) essentially means that the transfer satisfied what would have been an unsecured debt of the Debtor had the transfer not been made, and that unsecured creditors will receive less than a 100% dividend from the Chapter 7 case. The "greater amount test" was explained in <i>In re Lewis W Shurtleff, Inc.</i>, 778 F.2d 1416,1421 (9th Cir. 1985).</p>	<p>Points of Law:</p> <p>1. Asserts that Debtor was not insolvent, asserting that Schedules and Debtor's statements were that bankruptcy was filed due to lack of liquidity, not insolvency.</p> <p>2. 11 U.S.C. § 547(c)(2), transfers were in the ordinary course of business.</p> <p>3. 11 U.S.C. § 547(c)(1), transfers were for a contemporaneous exchange by Defendant. Defendant provided a statutory waiver and release of its stop payment notice and payment bond rights in exchange for, and in the amount of, the transfer.</p> <p>It is further asserted that the transfer satisfies the requirements under <i>In re Modtech Holdings, Inc.</i> (Bankr. C.D. Cal. 2013) because the owner had sufficient amounts remaining in its construction fund (including deductions for matured claims against the construction fund) to satisfy a hypothetical claim in the amount of the transfer.</p> <p>4. Laches. The trustee should be precluded from</p>

	<p>recovering any amounts from Defendant because the Trustee waited nearly two years after the bankruptcy petition (and well over two years after the transfer at issue) to bring this preference action.</p> <p>It is asserted that the delay has prejudiced Defendant. Defendant's right to payment for its work on the project at issue in this action was secured by a payment bond issued by Liberty Mutual Insurance Company, as required by California Civil Code §9550, et seq.</p> <p>Pursuant to California law and the terms of the bond, the bond is payable in the event that the contractor (Debtor) fails to pay the subcontractor (Defendant). However, California Civil Code §9558 requires that any claim against a payment bond be filed no later than 6 months after completion (or cessation of labor). Cessation of labor occurred in or about July 2013, at the time Debtor filed bankruptcy. By waiting two years from the date of the bankruptcy filing to file the present action, the trustee foreclosed Defendant's right to recover the allegedly preferential payment from Liberty Mutual.</p> <p>5. Diversion of Construction Funds Intended for Defendant. It is asserted that the single payment at issue was from a construction fund paid by the City of San Jose for the San Jose Innovation Center Project, and avoidance of said payment would be a violation of California Business & Professions Code §§7108 and 7108.5; Public Contract Code §§10262.5 and 10263; Civil Code §9100; the payment bond and other similar statutes and documents which require that released funds must be used to pay for the construction of the project for which the funds were paid and not diverted for some other use.</p>
<p>Abandoned Issues:</p> <p>1. None Identified</p>	<p>Abandoned Issues:</p> <p>1. Waiver</p> <p>2. Offset</p>

<p>Witnesses:</p> <ol style="list-style-type: none"> 1. Michael D. McGranahan 2. Stephen Ciari 	<p>Witnesses:</p> <ol style="list-style-type: none"> 1. James Applegate 2. Richard Applegate 3. Christine Bartholdt 4. John Bergman 5. Rebecca L. Bosque 6. Steve Ciari 7. Daniel M. Connolly 8. Anthony DiJulio 9. Alena Hernandez 10. Mike Herzog 11. Timothy Johnston 12. Diana Lehne 13. David Printy 14. Glenn Schwartzbach 15. David Sykes 16. Rod Tompkins 17. Michael Haughey 18. Celia Romero 19. Bobbie Amos 20. Yvonne Vigil 21. Skip Mancini 22. Marci A. Knapp 23. Representative of Flat 6, Westcroft Court, Kingsbury Road, Houston, TX NW9 9PG 24. Richard Barge 25. Daniel Cozart 26. Gleb Finkelman 27. Danielle Walker 28. Joseph A. Romeo 29. Danny Houston 30. Debera Wratten 31. Richard S. Long 32. Luz Smith 33. Renae Montemayor 34. John Sims 35. Diane Brand 36. Lloyd Attree 37. Terrence Rose 38. Representative of Fresh Coat Painters 39. Representative of A1 Quality Blinds 40. August A. Hioco

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|--|---|
| | 41. Ryan Eckert
42. Dan Watson
43. Jeff Qualle
44. Maureen Wood
45. Jordi Grant
46. Randall McClure
47. Michael Hernandez
48. Jill Foster
49. T Montez
50. Andy Tran
51. B-K Mill & Fixtures, Inc.
52. Sunstate Equipment
53. Mary DeSilva
54. Robert Yagmourian
55. Clark Pest Control
56. Shelco Industries
57. Collier Warehouse, Inc.
58. Wendy Biezkow, CFO
59. Karen Davani
60. Donald Phillips
61. Jay Fischer
62. Mitch Hajiaghai
63. Marlee Monty-Ingram
64. Ozzie Amparan
65. Hoc N. Hua
66. Karen Titus
67. Pacific Coast Trane Service Company, Inc.
68. Jeff O'Connel
69. Jennifer Reynolds
70. Priscila Kunkel
71. Roger Dills
72. Debbie Nute
73. Representative of RH Concrete
74. Kevin McEntee
75. Kelly Baird
76. Titan Surveying & Mapping, Inc. dba RB Welty & Associates, Inc., Manager.
77. Representative of River City Plastics
78. Representative of Sierra Trench Protection.
79. Representative of Ortiz Construction
80. Representative of CT Welding
81. Representative of New Engineering
82. Representative of James Oki Consulting Engineering
83. Representative of Martina Landscape |
|--|---|

	84. Representative of Power Plus 85. Representative of HCS Engineering, Inc. 86. Representative of Rutherford and Cheyenne
<p>Exhibits for Plaintiff-Trustee:</p> <ol style="list-style-type: none"> 1. Check dated May 17 2013 in the amount of \$32 392.74. 2. Applegate Johnston Construction Contract dated April 18 2012, 3. Claims Register in In re Applegate Johnston, Case No. 13-91315-E-7 and related claims. 4. Form 2 - Record of Receipts and Disbursements 	
<p>Exhibit for Defendant:</p> <p>Exhibit 1: Debtor's Schedules and Summaries filed on July 30, 2013, Dckt Nos. 36–45, Case No. 13-91315-E-7.</p> <p>Exhibit 2: Subcontract between Debtor and Defendant.</p> <p>Exhibit 3: Prime Contract (including specifications) between Debtor and City of San Jose.</p> <p>Exhibit 4: Payment Bond issued by Liberty Mutual Insurance Company.</p> <p>Exhibit 5: Billings, including backup, from Defendant to Debtor.</p> <p>Exhibit 6: Statutory Lien Waivers issued by Defendant.</p> <p>Exhibit 7: Payments from Debtor to Defendant on the Innovation Center project.</p> <p>Exhibit 8: Payment from Debtor to Defendant for \$32,392.74, dated May 17, 2013.</p> <p>Exhibit 9: Debtor's billings to the City of San Jose.</p> <p>Exhibit 10: Payments from the City of San Jose to Debtor.</p> <p>Exhibit 11: Correspondence between Defendant and Debtor regarding Innovation Center Project.</p> <p>Exhibit 12: Takeover Agreement between the City of San Jose and Liberty Mutual Insurance Company.</p>	

Exhibit 13: Payment bond and stop notices on the Innovation Center Project.

Exhibit 14: Conditional lien waivers issued by Debtor to City of San Jose.

Exhibit 15: Debtor letter to Liberty Mutual dated February 10, 2012.

Exhibit 16: Kilik California Notice of Claim on Bond dated January 23, 2012 [Dismissed 4/9/14].

Exhibit 17: RAM Rick Albert Machinery, Inc. Notice to Principal and Surety on Payment Bond on Public Work dated March 23, 2012.

Exhibit 18: RAM Rick Albert Machinery, Inc. Release of Stop Notice dated April 9, 2012.

Exhibit 19: Griffin Soil Stop Notice dated March 22, 2012.

Exhibit 20: Griffin Soil Release of Stop Notice dated March 26, 2012.

Exhibit 21: Double B Demolition, Inc. Stop Payment Notice dated August 22, 2012.

Exhibit 22: Valley Iron, Inc. Stop Payment Notice dated November 9, 2012.

Exhibit 23: Skyline Steel Erectors' Stop Payment Notice dated November 19, 2012 in the amount of \$167,584.74.

Exhibit 24: Email from Stephanie Miller to Diana Lehne dated February 7, 2013, confirming active claims.

Exhibit 25: Brown-Strauss Steel Payment Bond Claim dated November 21, 2012 in the amount of \$9,230.64.

Exhibit 26: Brown-Strauss Steel Payment Bond Claim dated July 17, 2013 in the amount of \$7,368.48.

Exhibit 27: Brown-Strauss Steel Stop Payment Notice dated July 17, 2013 in the amount of \$7,368.48.

Exhibit 28: C&T Welding, Inc.'s stop payment notice dated November 20, 2012, in the amount of \$253,095.20.

Exhibit 29: Ratification Agreement between C&T Welding, Inc. and Liberty Mutual dated October 9, 2013.

Exhibit 30: Amendment to Ratification Agreement between C&T Welding, Inc. and Liberty Mutual dated October 15, 2013.

Exhibit 31: IES notice of payment bond claim dated January 8, 2013 in the amount of \$74,236.87.

Exhibit 32: Granite Rock letter dated January 28, 2013 to Stephani Miller at Liberty Mutual enclosing proof of claim for \$4,281.35.

Exhibit 33: Email from Diana Lehne to Stephani Miller dated February 4, 2013, noting payment of Granite Rock claim as of \$4,281.35 as of February 1, 2013.

Exhibit 34: Granite Rock's unconditional waiver and release on final payment dated March 8, 2013.

Exhibit 35: Blackwood Associates, Inc. Stop Notice dated November 2, 2012 in the amount of \$42,671.70.

Exhibit 36: Blackwood Associates, Inc. release of stop notice dated February 14, 2013, in the amount of \$42,671.70.

Exhibit 37: Blackwood Associates, Inc. unconditional waiver and release on final payment dated February 14, 2013, waiving all claims except as to interest in the amount of \$2,836.92.

Exhibit 38: Blackwood Associates, Inc. Stop Notice in the amount of \$2,836.92 dated February 14, 2013.

Exhibit 39: Blackwood Associates, Inc. Release of Stop Notice in the amount of \$2,836.92, dated October 4, 2013.

Exhibit 40: Ahern Rentals, Inc.'s claim against payment bond in the amount of \$32,535.32, dated February 6, 2013.

Exhibit 41: Ahern Rentals, Inc.'s claim against payment bond in the amount of \$2,959.95, dated February 6, 2013.

Exhibit 42: Applegate joint check to C&T Welding, Inc. and Ahern Rentals in the amount of \$2,959.95, dated March 8, 2013.

Exhibit 43: Ahern Rentals, Inc. Unconditional wavier and release on final dated November 6, 2013.

Exhibit 44: Ahern Rentals, Inc. Release of lien claim, bond claim and stop notice in the amount of \$12,857.62, dated April 26, 2013.

Exhibit 45: Industrial Acoustics' Stop Notice in the amount of \$83,124.71, dated February 12, 2013.

Exhibit 46: Liberty Mutual check for \$24,187.21 to Industrial Acoustics dated August 15, 2013.

Exhibit 47: Email to Stephani Miller from Diana Lehne dated June 4, 2013, confirming \$50,000 payment to Industrial Acoustics.

Exhibit 48: Cresco Equipment Rentals' stop payment notice in the amount of \$12,197.84 dated February 25, 2013.

Exhibit 49: Cresco Equipment Rentals' Unconditional Waiver and Release on Final Payment dated April 17, 2013.

Exhibit 50: United Rentals' payment bond claim notice in the amount of \$44,988.31 dated April 17, 2013.

Exhibit 51: United Rentals' release of stop payment notice in its entirety, dated May 13, 2013.

Exhibit 52: United Rentals' Unconditional Waiver and Release on Final Payment dated May 14, 2013.

Exhibit 53: Letter from Last & Faoro dated March 26, 2013 referencing claim against payment bond by LGM Construction in the amount of \$130,882.63.

Exhibit 54: Email from Diana Lehne to Stephani Miller dated April 9, 2013, confirming only remaining amount due LGM Construction is retention.

Exhibit 55: Letter from Michael Zarate to Liberty Mutual dated March 25, 2013, noticing payment bond claim in the amount of \$495,645.87.

Exhibit 56: Letter from Karen Alarcon of Bay City Mechanical, Inc. to Liberty Mutual dated July 11, 2013 noting \$390,898.54 unpaid.

Exhibit 57: Bay City Mechanical, Inc.'s release of stop payment notice for \$430,815.60 dated April 16, 2013, signed by Bobbie Amos, CFO.

Exhibit 58: Industrial Acoustics' stop notice dated February 12, 2013 in the amount of \$83,124.71.

Exhibit 59: Check from Liberty Mutual to Industrial Acoustics dated August 15, 2013, in the amount of \$24,187.21.

Exhibit 60: Accent Clean & Sweep, Inc.'s notice of claim to Liberty Mutual dated July 2, 2013 in the amount of \$35,246.98, signed by Mike Haughey.

Exhibit 61: Accent Clean and Sweep's conditional waiver and release on final payment in the amount of \$35,246.98, dated September 18, 2013, signed by Mike Haughey.

Exhibit 62: Groundlevel Underground Grading & Excavating's claim information to Liberty Mutual dated July 9, 2013, with claim amount of \$7,325.00.

Exhibit 63: Groundlevel Construction's proof of claim form for the payment bond claim, dated August 5, 2013, in the amount of \$7,325.00.

Exhibit 64: A.J.R. Door Service, Inc.'s notice of claim (without amount) signed by Celia Romero, dated July 12, 2013.

Exhibit 65: PCS Professional Construction Services' notice of payment bond claim to Liberty Mutual dated July 11, 2013, in the amount of \$18,880. Signed by John Sims.

Exhibit 66: HFS, Inc. dba Houston Fire Services' payment bond claim dated July 10, 2013, in the amount of \$33,659.08, signed by Danny Houston.

Exhibit 67: Ratification agreement between HFS, Inc. and Liberty Mutual dated October 22, 2013, signed by Danny Houston.

Exhibit 68: HD Supply's notice of non payment and lienor's demand for copy of payment bond, dated July 11, 2013, signed by Diane Brand, in the amount of \$3,514.85.

Exhibit 69: HD Supply's notice to Liberty Mutual dated November 14, 2013 that HD was paid in full.

Exhibit 70: Corix Water Products, Inc.'s Stop Notice in the amount of \$780.97, dated July 12, 2013.

Exhibit 71: Chester C. Lehmann Company dba Electrical Distributors Co.'s stop payment notice claim in the amount of \$12,078.82, dated September 6, 2013.

Exhibit 72: Graybar Electric Co., Inc's payment bond claim, dated July 15, 2013, in the amount of \$78,565.94.

Exhibit 73: TA Rose Transportation's notice to principal and surety on payment bond, dated July 29, 2013, in the amount of \$17,590.00.

Exhibit 74: Cozart Brothers, Inc.'s notice and claim upon surety and bond principal, dated July 26, 2013, in the amount of \$196,735.

Exhibit 75: Liberty Mutual letter from Christine Bartholdt of Liberty Mutual confirming payment bond claim dated July 30, 2013 on behalf of Fresh Coat Painters.

Exhibit 76: Liberty Mutual letter from Christine Bartholdt of Liberty Mutual dated August 2, 2013, confirming payment bond claim dated July 30, 2013 on behalf of A1 Quality Blinds.

Exhibit 77: Letter from Lombardo Diamond Core Drilling Company, Inc. dated July 24, 2013, alleging a claim of \$2,405.20.

Exhibit 78: Notice of payment bond claim from Ciari to Liberty Mutual dated July 30, 2016, in the amount of \$133,205.08.

Exhibit 79: Notice of claim by Krazan & Associates to Liberty dated July 30, 2013, in the amount of \$49,792.19.

Exhibit 80: Ratification Agreement between B T Mancini Co. Inc. and Liberty Mutual dated July 23, 2013, amount currently due is \$10,115.10.

Exhibit 81: Ratification Agreement between Service Metal Products, Inc. and Liberty Mutual dated July 23, 2013, amount currently due is \$7,529.40.

Exhibit 82: Ratification Agreement between Atlantis Interiors, Inc. and Liberty Mutual dated July 23, 2013, amount currently due is \$6,746.18.

Exhibit 83: Ratification Agreement between Better Built Truss and Liberty Mutual dated July 23, 2013, amount currently due is \$45.

Exhibit 84: Western Electrical Contractors Association, Inc.'s payment bond claim dated August 1, 2013, in the amount of \$5,111.40.

Exhibit 85: Stop payment notice from Western Electrical Contractors Association, Inc. in the amount of \$5,111.40, dated September 9, 2013.

Exhibit 86: Ratification Agreement between 3 C JR Painting, Inc., dba Freshcoat Painters and Liberty Mutual dated August 7, 2013.

Exhibit 87: Ratification Agreement between Corporate Sign Systems, Inc. and Liberty Mutual dated July 23, 2013.

Exhibit 88: Ratification Agreement between ACE Automatic Garage Doors and Liberty Mutual dated July 23, 2013.

Exhibit 89: Letter of Transmittal from San Benito Drywall, Inc. to Liberty Mutual dated August 6, 2013, in the amount of \$46,872.84, with backup.

Exhibit 90: Ratification Agreement between Montez Glass and Liberty Mutual dated August 7, 2013.

Exhibit 91: Ratification Agreement between Control Technologies and Liberty Mutual dated August 8, 2013.

Exhibit 92: Ratification Agreement between B-K Mill & Fixtures, Inc. and Liberty Mutual dated August 7, 2013.

Exhibit 93: Email from Luis Aragon at Liberty confirming new claim by Sunstate Equipment, dated August 15, 2013.

Exhibit 94: Proof of claim form for Sunstate dated August 26, 2013.

Exhibit 95: Ratification Agreement between US Overhead Door Co., Inc. and Liberty Mutual dated August 9, 2013.

Exhibit 96: Ratification Agreement between YAG Manufacturing and Liberty Mutual dated July 23, 2016.

Exhibit 97: Email chain dated August 21, 2013 between Rodney Tomkins and Jeff Robbins confirming no money due Clark Pest Control.

Exhibit 98: Email chain dated August 21, 2013 between Rodney Tomkins, Rudy Mueller and Jeff Robbins confirming no money due Shelco Industries.

Exhibit 99: Ratification Agreement dated August 16, 2013 between Collier Warehouse, Inc. and Liberty Mutual.

Exhibit 100: Ratification Agreement dated August 21, 2013 between Creative Masonry, Inc. and Liberty Mutual. Total amount currently due is \$1,070.92.

Exhibit 101: Letter from Karen Davani, Commercial Collector, dated September 11, 2013, on behalf of Sunbelt Rentals.

Exhibit 102: Cemex Notice of Intent to File a Stop Notice or Bond Claim, dated August 16, 2013.

Exhibit 103: Ratification Agreement dated August 14, 2013 between Pacific Design Associates, Inc. and Liberty Mutual. Total amount currently due is \$5,609.22.

Exhibit 104: Ratification Agreement dated July 8, 2013 between Fischer Tile & Marble, Inc. and Liberty Mutual.

Exhibit 105: Email from Mitch Hajiaghahi of Sierra Environmental to Christine Bartholdt dated August 27, 2013, asserting a claim against the payment bond.

Exhibit 106: Letter from Christine Bartholdt at Liberty to Richard Applegate noting a claim presented against the payment bond on behalf of Sierra Environmental on August 27, 2013 in the amount of \$6,992.00.

Exhibit 107: Letter from Christine Bartholdt at Liberty to Richard Applegate dated September 9, 2013, referencing a payment bond claim by Ace Portable Services dated September 2, 2013, in the amount of \$2,290.

Exhibit 108: ACE Portable Services payment bond claim dated September 2, 2013 in the amount of \$2,290.00.

Exhibit 109: Ratification Agreement dated July 23, 2013 between Amparan Flooring, Inc. and Liberty Mutual.

Exhibit 110: Ratification Agreement dated August 7, 2013 between H Square Mechanical, Inc. and Liberty Mutual.

Exhibit 111: Ratification Agreement dated August 8, 2013 between R Titus Waterproofing and Liberty Mutual.

Exhibit 112: Ratification Agreement dated August 21, 2013 between Pacific Coast Trane Service Company, Inc. and Liberty Mutual.

Exhibit 113: Ratification Agreement dated August 21, 2013 between Glendon Company and Liberty Mutual.

Exhibit 114: Ratification Agreement dated August 20, 2013 between SignaWest Systems, Inc. and Liberty Mutual.

Exhibit 115: Ratification Agreement dated August 27, 2013 between Green Bay Builders and Liberty Mutual.

Exhibit 116: Construction Collection Specialists letter dated September 6, 2013 on behalf of Sunstate Equipment Co., LLC.

Exhibit 117: Email from Ronnie Collins dated September 10, 2016 from Roxanne Collins to Christine Bartholdt regarding claims against payment bond on behalf of Dr. Deutch in the amount of \$1,400.

Exhibit 118: Ratification Agreement dated September 19, 2013 between RH Concrete and Liberty Mutual.

Exhibit 119: Ratification Agreement dated September 12, 2013 between SecureCom, Inc. and Liberty Mutual.

Exhibit 120: Ratification Agreement dated October 7, 2013 between WSP Roofing and Liberty Mutual.

Exhibit 121: Ratification Agreement dated August 8, 2013 between Titan Surveying & Mapping, Inc. dba RB Welty & Associates, Inc. and Liberty Mutual.

Exhibit 122: Ratification Agreement between River City Plastics and Liberty Mutual dated October 10, 2013

Exhibit 123: Invoice dated October 14, 2013 from River City Plastics \$2,574.

Exhibit 124: Conditional waiver and release on progress payment from Hertz Equipment Rental Corp. dated November 13, 2013 in the amount of \$6,410.80.

Exhibit 125: Conditional waiver and release on progress payment from Sierra Trench Protection dated November 18, 2013 in the amount of \$1,760.

Exhibit 126: Email from Christine Bartholdt to Amanda Marutsky regarding Ortiz Construction claim

of \$10,848.92 dated October 24, 2013

Exhibit 127: Ratification Agreement between Ortiz Construction and Liberty Mutual dated October 14, 2013.

Exhibit 128: Conditional waiver and release on progress payment from CT Welding and New Engineering dated October 21, 2013 in the amount of \$7,101.25.

Exhibit 129: Conditional waiver and release on progress payment from CT Welding and James Oki Consulting Engineering dated illegible in the amount of \$6000.

Exhibit 130: Conditional waiver and release on progress payment from CT Welding and Star Seismic dated October 21, 2013 in the amount of \$18,599.00.

Exhibit 131: Ratification Agreement between Martina Landscape and Liberty Mutual dated October 22, 2013.

Exhibit 132: Conditional waiver and release on progress payment from Power Plus dated December 10, 2013 in the amount of \$682.50.

Exhibit 133: Email from Ron Ashlock to Christine Bartholdt dated December 30, 2013 regarding settlement of HCS Engineering, Inc's claim \$1,747.00.

Exhibit 134: Email from Ron Ashlock to Christine Bartholdt dated December 30, 2013 asking for payment of \$840.00 for Rutherford and Cheyenne.

Exhibit 135: Stop notice summary from Liberty Mutual dated June 27, 2014.

Exhibit 136: Release of stop notice by Accent Clean and Sweep Supply, Inc. dated October 14, 2013.

Exhibit 137: Release of stop notice by AJR Door Service dated October 16, 2013.

Exhibit 138: Release of stop payment notice by Bay City Mechanical, Inc. dated September 13, 2013.

Exhibit 139: Unconditional waiver and release on progress payment by Bay City Mechanical, Inc. dated September 19, 2013.

Exhibit 140: Release of stop notice by Brown-Strauss Steel dated November 18, 2013.

Exhibit 141: Release of stop notice by B.T. Mancini Co., Inc. dated December 9, 2013.

Exhibit 142: Release of stop notice by Cemex dated October 7, 2013.

Exhibit 143: Release of stop notice by Stephen Ciari Plumbing & Heating, Inc. dated November 12, 2013.

Exhibit 144: Release of stop notice by Corix Water Products (US), Inc. dated October 19, 2013.

Exhibit 145: Release of stop notice by Cozart Brothers dated October 4, 2013.

Exhibit 146: Release of stop notice by Electrical Distributors dated December 2, 2013.

Exhibit 147: Release of stop notice by Graybar Electric Co., Inc. dated October 3, 2013.

Exhibit 148: Release of stop notice by Ground Level Construction dated November 27, 2013.

Exhibit 149: Release of stop notice by Houston Fire Systems dated November 9, 2013.

Exhibit 150: Release of stop notice by Industrial Acoustics Co. dated November 27, 2013.

Exhibit 151: Release of stop notice by Lombardo Diamond Core Drilling dated December 2, 2013.

Exhibit 152: Release of stop notice by Skyline Steel Erectors dated November 08, 2013.

Exhibit 153: Release of stop notice by Valley Iron, Inc. dated November 27, 2013.

Exhibit 154: Letter dated July 3, 2013 from David Sykes at the City of San Jose to Liberty Mutual demanding performance under performance bond.

Exhibit 155: Applegate A/R History by Job dated August 18, 2015.

Exhibit 156: Applegate A/R History by Job dated October 14, 2015.

Exhibit 157: City of San Jose Application and Certificate for Payment.

Exhibit 158: City of San Jose Stop Notice Logs

Exhibit 159: City of San Jose spreadsheet reflecting amounts withheld from and paid to Applegate.

Exhibit 160: Stipulation Re Non-Party Discovery, Protective Order for Document Production and PMK Deposition.

Exhibit 161: Supplemental Declaration of Christine Bartholdt in support of Liberty Mutual Insurance Company's Motion for Partial Summary Judgment.

Exhibit 162: Liberty Mutual Insurance Company Loss Run Report dated May 2, 2016.

Exhibit 163: Liberty Mutual General Agreement of Indemnity dated November 9, 2010. Letter dated July 3, 2013 from David Sykes of the City of San Jose to Jim Applegate regarding abandonment of Environmental Innovation Center Project.

Exhibit 164: Letter dated July 3, 2013 from David Sykes of the City of San Jose to Luis Aragon regarding demand to takeover project.

Exhibit 165: Email dated February 7, 2013 from Stephanie Miller to Diana Lehne.

Exhibit 166: Email dated December 7, 2012 from Alena Hernandez, Ciari, to Michael Solgaard and others at Applegate re August Funds.

Exhibit 167: Email dated March 27, 2013 from Alena Hernandez, Ciari, to Diane Lehne and others at Applegate re corrected invoice with attached application for payment and Conditional waiver and release.

Exhibit 168: Email dated October 25, 2012 from Alena Hernandez, Ciari, to Mike Herzog.

Exhibit 169: Email dated March 26, 2013 from Alena Hernandez, Ciari, to Diane Lehne and others at Applegate.

Exhibit 170: Email dated January 11, 2013 from Diane Lehne to Alena Hernandez.

Exhibit 171: Email dated April 19, 2013 from Diane Lehne to Alena Hernandez.

Exhibit 172: Email dated October 31, 2012 from Alena Hernandez, Ciari, to Diane Lehne and others at Applegate.

Exhibit 173: Email dated May 21, 2013 from Diane Lehne to Alena Hernandez.

Exhibit 174: Email dated January 11, 2013 from Diane Lehne to Alena Hernandez.

Exhibit 175: Email dated May 25, 2012 from Alena Hernandez, Ciari, to Mike Herzog.

Exhibit 176: Email dated January 11, 2013 from Alena Hernandez, Ciari, to John Bergman and others at Applegate.

Exhibit 177: Email dated June 25, 2012 from Alena Hernandez, Ciari, to Diane Lehne and Mike Herzog.

Exhibit 178: Email dated February 25, 2013 from Alena Hernandez, Ciari, to Diane Lehne and Mike Herzog.

Exhibit 179: Email dated October 25, 2012 from Alena Hernandez, Ciari, to Anthony De Julio.

Exhibit 180: Email dated June 17, 2013 from Alena Hernandez, Ciari, to Diane Lehne and Mike Herzog.

Exhibit 181: Email dated May 21, 2013 from Alena Hernandez, Ciari, to Diane Lehne and Mike

<p>Herzog.</p> <p>Exhibit 182: Email dated March 26, 2013 from Alena Hernandez, Ciari, to Diane Lehne.</p> <p>Exhibit 183: Email dated December 14, 2012 from Alena Hernandez, Ciari, to Diane Lehne and Mike Herzog.</p>	
<p>Discovery Documents:</p> <ol style="list-style-type: none"> 1. Defendant's Response to Requests for Admissions, Set No.1. 2. Defendant's Response to Plaintiffs Interrogatories, Set No.1. 3. Deposition Transcript of Liberty Mutual. 	<p>Discovery Documents:</p> <ol style="list-style-type: none"> 1. Defendant's Special Interrogatories to Trustee served on February 12, 2016 and the Trustee's Responses dated March 25, 2016, as reflected below.
<p>Further Discovery or Motions:</p> <ol style="list-style-type: none"> 1. None identified 	<p>Further Discovery or Motions:</p> <ol style="list-style-type: none"> 1. None identified
<p>Stipulations:</p> <ol style="list-style-type: none"> 1. None identified 	<p>Stipulations:</p> <ol style="list-style-type: none"> 1. Defendant believes that stipulation as to certain facts is possible. The parties have agreed to meet and confer on this point.
<p>Amendments:</p> <ol style="list-style-type: none"> 1. None identified 	<p>Amendments:</p> <ol style="list-style-type: none"> 1. None identified
<p>Dismissals:</p> <ol style="list-style-type: none"> 1. None identified 	<p>Dismissals:</p> <ol style="list-style-type: none"> 1. None identified
<p>Agreed Statement of Facts:</p> <ol style="list-style-type: none"> 1. None identified 	<p>Agreed Statement of Facts:</p> <ol style="list-style-type: none"> 1. Parties have agreed to meet and confer to determine what may be included in an agreed statement of facts.

Attorneys' Fees Basis: 1. Attorneys' fees not requested	Attorneys' Fees Basis: 1. Attorneys' fees not requested
Additional Items 1. None identified	Additional Items 1. None identified
Trial Time Estimation: One-Half Day	Trial Time Estimation: Five to Seven Days

4. [16-90817-E-7](#) **DANIEL ANDERSEN** **STATUS CONFERENCE RE:**
[16-9017](#) **COMPLAINT**
ANDERSEN V. UNITED STATES OF
AMERICA, INTERNAL REVENUE **11-10-16 [1]**

Final Ruling: No appearance at the January 5, 2017 Status Conference is required.

Plaintiff's Atty: Pro Se
Defendant's Atty: unknown

Adv. Filed: 11/10/16
Answer: none

Nature of Action:
Dischargeability - priority tax claims

The Status Conference is continued to 2:00 p.m. on February 23, 2017, to afford Plaintiff-Debtor the opportunity to prosecute his motion for entry of default judgment.

Notes:
Entry of Default and Order re Default Judgment Procedures [Department of Treasury] filed 12/16/16 [Dckt 14]

Entry of Default and Order re Default Judgment Procedures [Internal Revenue Service] filed 12/16/16 [Dckt 15]

Entry of Default and Order re Default Judgment Procedures [United States of America] filed 12/16/16 [Dckt 16]

Motion for Entry of Default Judgment filed 12/22/16 [Dckt 17], set for hearing 1/26/17 at 10:30 a.m.

5. [15-90470-E-7](#) SUSAN FISCOE

[15-9056](#)

FARRAR V. FISCOE

ADV. CASE CLOSED: 12/08/2016

**PRE-TRIAL CONFERENCE RE:
COMPLAINT OBJECTING TO
DISCHARGE
10-6-15 [\[1\]](#)**

Final Ruling: No appearance at the January 5, 2017 Pretrial Conference is required.

Plaintiff's Atty: Dana A. Suntag

Defendant's Atty: David C. Johnston

Adv. Filed: 10/6/15

Answer: 11/26/15

Nature of Action:

Objection/revocation of discharge

Judgment having been entered in this Adversary Proceeding, **the Pre-Trial Conference is removed from the calendar.**

Notes:

Judgment against Defendant Susan J. Fiscoe entered 11/20/16 [Dckt 28]

6. [16-90683](#)-E-7 **MICHAEL STANFIELD**
16-9015
FIRST NATIONAL BANK OF OMAHA
V. STANFIELD

STATUS CONFERENCE RE:
COMPLAINT
11-3-16 [1](#)

Plaintiff's Atty: Cory J. Rooney
Defendant's Atty: Christian J. Younger

Adv. Filed: 11/3/16
Answer: 12/6/16

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud

Notes:

SUMMARY OF COMPLAINT

First National Bank of Omaha ("Plaintiff") has filed a Complaint (Dckt. 1) asserting that an obligation in the amount of \$3,000.00 (plus costs and expenses) is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). The obligation was incurred by Defendant-Debtor in writing a "check" for \$3,000.00 to obtain monies on Defendant-Debtor's credit card account with Plaintiff.

SUMMARY OF ANSWER

Michael Stanfield ("Defendant-Debtor") has filed an Answer (Dckt. 8) that admits and denies specific allegations in the Complaint.

REQUIRED PLEADING OF CORE AND NON-CORE MATTERS, CONSENT OR NON-CONSENT TO NON-CORE MATTER

The basic pleading requirements of Federal Rule of Civil Procedure 8 for a complaint, including that the complaint "[m]ust contain: (1) a short and plain statement of the grounds for the court's jurisdiction...", apply to complaints in Adversary Proceedings. In add to incorporating Rule 8, Federal Rule of Bankruptcy Procedure 7008 adds the addition pleading requirement concerning whether the matters in the complaint are core or non-core:

"Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, **the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if**

non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.”

Fed. R. Bankr. P. 7008 (emphasis added).

For a responsive pleading, Federal Rule of Bankruptcy Procedure 12(b) applies in adversary proceeding. Fed. R. Bankr. P. 7012(b). The Bankruptcy Rules add a further responsive pleading requirement concerning whether the matter are core or non-core, as well as the consent or non-consent for non-core matters by the responding party:

“(b) Applicability of Rule 12(b)-(I) F.R.Civ.P. Rule 12(b)-(I) F.R.Civ.P. applies in adversary proceedings. A responsive pleading **shall admit or deny an allegation that the proceeding is core or non-core**. If the response is that the proceeding is **non-core**, it **shall include a statement that the party does or does not consent** to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge’s order except with the express consent of the parties.”

Fed. R. Bank. P. 7012(b) (emphasis added).

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157. Complaint ¶¶ 1, 2, Dckt. 1. In his answer, Defendant-Debtor admits the allegations of jurisdiction and core proceedings. Answer ¶¶ 1, 2, Dckt. 8. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

ISSUANCE OF PRE-TRIAL SCHEDULING ORDER

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

- A. The Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157. Complaint ¶¶ 1, 2, Dckt. 1. In his answer, Defendant-Debtor admits the allegations of jurisdiction and core proceedings. Answer ¶¶ 1, 2, Dckt. 8. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this is Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.

- B. Initial Disclosures shall be made on or before -----, **2017**.
- C. Expert Witnesses shall be disclosed on or before -----, **2017**, and Expert Witness Reports, if any, shall be exchanged on or before -----, **2017**.
- D. Discovery closes, including the hearing of all discovery motions, on -----, **2017**.
- E. Dispositive Motions shall be heard before -----, **2017**.
- F. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at -----
p.m. on -----, 2017.